Supreme Court, U.S.
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88-2081

No. _____

In the
Supreme Court of the United States
October Term, 1988

JOHN ROBERT BOONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court review and clarify the application of Rule 32(d), Federal Rules of Criminal Procedure, as to pre-sentence withdrawal of guilty pleas, and construe it in this case to require the district court to allow withdrawal of a guilty plea before sentence, where the defendant (petitioner here) is confused, frustrated and reluctant at the time of the guilty plea, the plea is negotiated the night before trial, the plea is part of a "package deal" in which the prosecution would agree to the negotiation only if all three defendants entered guilty pleas, and the defendant-petitioner felt compelled not to jeopardize the pleas of the other two defendants?

TABLE OF CONTENTS

	Page
Questions Presented For Review. . .	i
Table of Contents	ii
Table of Authorities.	iii
Reports of Opinions Below	v
Jurisdiction.	vi
Constitutional Provisions and Rules	vii
Statement of the Case	1
Reasons for Allowing the Writ . . .	8
Appendix:	
Opinion of the Eighth Circuit .	A-1
Judgment.	A-15
Order Denying Rehearing	A-17

TABLE OF AUTHORITIES

Page

Cases:

Hill v. United States, 368 U.S. 424 (1962). 9
Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963). . 11
Kercheval v. United States, 274 U.S. 220 (1927). 12
McCarthy v. United States, 394 U.S. 459 (1969) 12
United States v. Barker, 514 F.2d 208 (D.C. Cir. 1975) . . . 15
United States v. Boone, 869 F.2d 1089 (8th Cir. 1988) . . . 6
United States v. Bradin, 535 F.2d 1039 (8th Cir. 1976) . . . 12
United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979). . . . 17
United States v. Harvey, 463 F.2d 1022 (4th Cir. 1972). 16
United States v. Pressley, 602 F.2d 709 (5th Cir. 1979). . . . 11
United States v. Roland, 318 F.2d 406 (4th Cir. 1963) 11
United States v. Savage, 561 F.2d 554 (4th Cir. 1977). . . . 11
United States v. Truglio, 493 F.2d 574 (4th Cir. 1974). . 17

Constitution:
U.S.CONST., AMENDMENT V 1,3
U.S.CONST., AMENDMENT VI 3

Statutes:
18 U.S.C. § 2 1,2
" " " 3321. 1

21 " " 841 1,2
28 " " 2255. 9

Rules:

Rule 17, Rules of the Supreme Court of the United States. 10
Rule 6, Federal Rules of Criminal Procedure. 1
Rule 7, Federal Rules of Criminal Procedure. 1
Rule 11, Federal Rules of Criminal Procedure. 2,8,12
Rule 32(d), Federal Rules of Criminal Procedure. 9,10, 11,13,18,19

Secondary Authorities:

Wright, Federal Practice and Procedure, Vol. 3, p. 199 . . . 11

REPORT OF OPINION BELOW

The case is reported below as United States v. John Robert Boone, et al., 869 F.2d 1089 (8th Cir. 1988), rehearing and rehearing en banc denied April 12, 1989, contained in the appendix to this petition.

JURISDICTION

The date of the judgment below was March 6, 1989, and a petition for rehearing and rehearing en banc was denied on April 12, 1989. The statutory provision believed to confer jurisdiction to review the matter by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND RULES

United States Constitution:

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war and public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Rule 32(d), Federal Rules of Criminal Procedure

If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

STATEMENT OF THE CASE

The basis of federal jurisdiction in the court of first instance, the United States District Court for the District of Minnesota, was an indictment for violation of 21 U.S.C. § 841 and 18 U.S.C. § 2, returned under Rules 6, 7, Federal Rules of Criminal Procedure, and 18 U.S.C. § 3321, pursuant to the requirement of indictment in the Fifth Amendment to the Constitution of the United States. The proceedings were in United States District Court, District of Minnesota, Hon. Edward Devitt, Senior Judge, presiding.

Petitioner Boone was indicted with others for marijuana violations, and all except three defendants had pled guilty before the trial date, February 17, 1988.

The night before trial, petitioner was persuaded by his trial counsel to plead guilty to marijuana manufacturing violations of 21 U.S.C. § 841(a)(1), 841(b)(1)(A)(vii) and 18 U.S.C. § 2. This was a "package" plea, since the prosecutor would negotiate only if all three remaining defendants pled guilty. The indictment exposed Mr. Boone to a potential life sentence, the negotiated plea to 20 years without parole plus a fine, assessment, and special parole.

At the plea, Mr. Boone did not voice any complaints, said he understood the charges and proceedings, and expressed confidence in his trial counsel. (No violations of guilty plea procedures as such under Rule 11, Federal Rules of Criminal Procedure, are alleged.)

Thereafter, and before a date for sentencing was scheduled, Mr. Boone retained new counsel, who moved to withdraw the plea on the grounds it was not truly voluntary because trial counsel: had not prepared adequately for trial, had told Mr. Boone he would be sentenced to life if he did not plead, had changed an opinion that a search and seizure issue could be won on appeal, and had said the negotiations of the other two defendants were dependent upon his plea.

The motion was heard on April 18, 1988. Over objection of his counsel, asserting his Fifth and Sixth Amendment rights, the judge required Mr. Boone to testify (i.e., the judge would not allow the moving papers to make the record for

the basis of the motion), and also over assertion of Mr. Boone's attorney-client privilege his trial counsel testified for the government. Though Mr. Boone and his counsel disagreed on some points, it was not in dispute that: 1) The plea was agreed upon only the day before the trial which Mr. Boone fully expected to take place; 2) Trial counsel was from another state; 3) One of the trial lawyers was not present for trial; 4) Mr. Boone had been in custody since his arrest; 5) A life sentence was possible under the indictment; 6) Counsel did not do certain things Mr. Boone requested in preparation for trial, including interviewing some eye-witnesses and examining the scene of the offense; 7) Mr. Boone's counsel conferred with other

defendants in the absence of their counsel as well; 8) Mr. Boone may have been "confused" about the appeal issue; 9) Mr. Boone was "plainly frustrated" about the plea; and 10) The plea was a "package" and if Mr. Boone insisted on his right to a trial the prosecutor would not agree to the pleas of the two other defendants.

Although Mr. Boone testified to other matters (e.g. that the morning of the plea he told his counsel he did not want to plead), we do not rely on those matters which his trial counsel did not confirm, so that this Court need not resolve any questions of credibility. The 10 factors just recited were acknowledged by counsel.

Judge Devitt denied the motion to withdraw the plea and on the same day sentenced all defendants. Mr. Boone received a term of 20 years, five years supervised release, and a $50 special assessment.

The Court of Appeals for the Eighth Circuit affirmed, United States v. Boone, 869 F.2d 1089 (8th Cir. 1988), and denied rehearing and rehearing en banc on April 12, 1989. The opinion, judgment and order are in the appendix. (One co-defendant, Lanham, appealed his sentence, and the court affirmed in the same opinion as to him as well, but he is not a party to this petition.) The court held it was no abuse of discretion to deny the motion to withdraw, because Mr. Boone had not shown the plea was

involuntary or without effective assistance of counsel. 869 F.2d at 1092.

REASONS FOR ALLOWING THE WRIT

IT IS IMPORTANT FOR THIS COURT TO EXAMINE AND CLARIFY THE CRITERIA FOR WITHDRAWAL OF GUILTY PLEAS BEFORE SENTENCE FOR THE GUIDANCE OF INFERIOR COURTS AND TO INSURE FUNDAMENTAL FAIRNESS.

Because a guilty plea waives all of a defendant's important constitutional, statutory, and common law rights and privileges comprised in a jury trial, (except, of course, to due process and effective counsel to the extent these apply to guilty pleas under Rule 11, Federal Rules of Criminal Procedure, which are not in issue here), it is manifestly of great, widespread, and continuing importance that A) waivers by guilty plea be scrupulously handled to ensure fairness and genuine voluntariness, and B) that defendants be allowed relatively freely to withdraw pleas, before sen-

tence, under Rule 32(d), Federal Rules of Criminal Procedure.

For good and obvious reasons, this freedom of withdrawal is not as generous after sentence, (when relief must be sought under 28 U.S.C. § 2255), because defendants cannot expect to revive their trial rights merely because they are dissatisfied with sentences imposed. See Hill v. United States, 368 U.S. 424, 428 (1962). But where, as here, the motion is before sentencing, and based upon several undisputed facts tending persuasively to show actual involuntariness, (including pre-eminently the last-minute timing of the negotiation, the "confusion" and "frustration" of the defendant, the absence of one of his trial lawyers, and the "package" plea

bargain), there is an extremely serious danger of injustice; and there is no prejudice to the prosecution.

We respectfully submit that the action of the trial judge, affirmed by the Court of Appeals is in conflict with the letter and spirit of Rule 32(d) as construed by this and other Courts, departs from the accepted and usual course of such proceedings, requiring this Court's supervisory intervention, and raises important questions which this Court has not but should decide for the guidance of the inferior courts in the instances when such motions will be made. Thus, this petition falls within the criteria of Rule 17 of this, the Supreme Court of the United States.

Although neither Rule 32(d) nor its comment recognizes an absolute right to pre-sentence withdrawal, Professor Wright observes: "Many cases teach that leave to withdraw should be freely granted if it is sought before sentencing," Federal Practice and Procedure, vol. 3, p. 199, citing inter alia United States v. Savage, 561 F.2d 554, 556 (4th Cir. 1977); United States v. Pressley, 602 F.2d 709 (5th Cir. 1979); and in United States v. Roland, 318 F.2d 406, 409 (4th Cir. 1963) the court said:

> A motion to withdraw a plea ... should be allowable as of course, or almost so, before judgment and the imposition of sentence.

See also Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963), discussing the differing considerations and

criteria applicable to pre-sentence and post-sentence motions.

The Eighth Circuit in United States v. Bradin, 535 F.2d 1039, 1040 (8th Cir. 1976), recognized a "fair and just" standard, which this Court referred to obiter in Kercheval v. United States, 274 U.S. 220, 224 (1927). And see McCarthy v. United States, 394 U.S. 459 (1969), a Rule 11 case, but pertinent here as reflecting this Court's concern for the fairness and integrity of guilty pleas. We also note that Kercheval v. United States, supra, indicates that such a motion does not involve any question of guilt or innocence. Like other inferior courts, however, the Eighth Circuit here weighed the fact Mr. Boone did not assert innocence, 869 F.2d

at 1091-1092. The opinion also weighs the length of time between the plea and the motion, and recognizes relevance to but does not consider in this case the question of whether prejudice to the government would result from withdrawal.

These are elements not embodied in Rule 32(d) itself, and we venture to say it is very important for this Court to examine these criteria since as applied in the lower courts they appear to be resulting in unfairness. Innocence, of course, is not relevant, or should not be, since until the moment of the plea each accused is presumed innocent and it is the very relinquishment of that presumption (among other important rights, privileges and immunities) that is involved in every guilty plea. The "inno-

cent" is absolutely no more entitled to a trial than the "guilty" as we use those terms in their constitutional context.

The length of time is also an improper consideration. Here, for example, the petitioner was in custody in Minnesota, but his trial counsel were in another state and communications were therefore more difficult than they would be for a person released pending trial; incarceration also makes it more difficult for a person who has involuntarily pled guilty to confer with and retain other counsel to discuss a motion to withdraw. Moreover, here even trial counsel agreed Mr. Boone was reluctant to plead, "frustrated" and "confused." The motion to withdraw was made by other

counsel promptly after being retained, and before a sentencing date was set. Thus it is at best grossly unfair to imply that this petitioner delayed the discussion in any way. More broadly, however, we suggest this Court should make it clear that in fairness and as a matter of equal access to remedies no defendant's motion to withdraw should be prejudiced by some hiatus after the plea, so long as it is made before sentencing, and in the absence of evidence of intentional delay. This is also true because different courts have very different workloads and scheduling practices, and these should not influence decision on the merits of a motion to withdraw a plea. See generally United States v. Barker, 514 F.2d 208 (D.C.

Cir. 1975) for discussion of the "swift change of heart" factor.

This Court may also wish to address the relevance vel non of prejudice to the government. Here the Eighth Circuit mentioned the issue, but did not apply it. 869 F.2d at 1091-1092. See United States v. Harvey, 463 F.2d 1022 (4th Cir. 1972), for a decision indicating that withdrawal should be allowed unless the government first shows that it will be prejudiced; if the showing is made, then the trial court considers the grounds for the motion. Compare Advisory Committee Note to Rule 32(d) contra. We find this a fair and reasonable approach; but, more importantly for present purposes, it is a question this Court may helpfully examine in the present case.

Finally, the "package" plea bargain obviously raises troublesome questions directly relevant to fairness and voluntariness. See United States v. Truglio, 493 F.2d 574 (4th Cir. 1974), and United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979), for concerns expressed about such pressures in different but similar and analagous circumstances. We need not labor the point that a plea is not voluntary or fair if it results from compassion for (or, for that matter, fear of) the consequences to others, especially other defendants. The potential for abuse of such practices is vivid.

In closing we emphasize that we do not presume to demand a per se rule of automatic and absolute right to withdraw

a plea, even before sentencing. We need not, because here there are ten persuasive undisputed facts supporting the motion, set forth above. Recognizing this Court's mission and workload, we simply offer our convictions, (those of advocates, to be sure), that it is essential for this Court to examine Rule 32 (d) and provide guidance to the lower courts, which are adrift now, creating and embellishing criteria for applying the rule, sometimes (as in the present case) in a way which contrary to the Rule's intent would make withdrawal virtually impossibles, and would leave trial courts with absolutely unfettered discretion. This is tantamount to repeal of Rule 32(d), obliterating the crucial distinctions between pre and post-sentence motions.

CONCLUSION

For these reasons, petitioner Boone respectfully prays that a writ of certiorari issue to allow examination and clarification by this Court of these important issues under 32(d).

Respectfully submitted,

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APPENDIX INDEX

	Page
Opinion of the Eighth Circuit . .	A-1
Judgment.	A-15
Order Denying Rehearing	A-17

United States Court of Appeals,
Eighth Circuit

UNITED STATES of America, Appellee,

v.

John Robert BOONE, Appellant.

No. 88-5186

Submitted Nov. 18, 1988.

Decided March 6, 1989.

Rehearing and Rehearing En Banc Denied
April 12, 1989.

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and NICHOL, Senior District Judge.

LAY, Chief Judge.

John Robert Boone pled guilty to unlawfully manufacturing in excess of 1000 kilograms (over 20 tons) of marijuana in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A)(vii), and 18 U.S.C. § 2 as part of a plea agreement on February 17, 1988.[1] Before sentencing he retained new counsel and moved to withdraw his plea on

April 18, 1988. The district court[2] denied the motion on April 29, 1988, and sentenced Boone to twenty years without parole.[3] He now appeals the denial of his pre-sentence motion to withdraw his guilty plea. He also asserts that the district court erroneously denied his motion to suppress a search which allegedly was based on false information.

David Brook Lanham, as part of his plea agreement, pled guilty to conspiracy to distribute marijuana. 21 U.S.C. §§ 841, 846. Under the agreement, he was subject to a sentence of up to eight years and a fine of up to $1,000 with a $50 special assessment. Lanham objected at the time of sentencing to portions of the pre-sentence investigation report which suggested that he served in a "managerial capacity" in the marijuana operation. The

court stated that it would not consider the items to which Lanham objected for sentencing purposes pursuant to rule 32(c)(3)(D)(ii). The court sentenced Lanham to the maximum time of eight years while giving co-defendants milder sentences. Lanham contends the trial court abused its discretion by imposing the maximum sentence.

John Robert Boone

Boone claims his guilty plea was involuntary due to ineffective assistance of counsel. He alleges that his attorney failed to thoroughly investigate the charges, that the "package" plea agreement involving two co-defendants was not in his best interest, and that his attorney told him the night before his plea that if he did not plead guilty he would receive a life sentence. Boone also contends that

his counsel suddenly changed his opinion regarding an alleged faulty application for the search warrant. The night before arraignment, Boone claims counsel told him he probably would not succeed on this issue. Therefore, Boone claims the district court erred in denying his motion under Federal Rule of Criminal Procedure 32(d) which allows withdrawal of a plea before sentencing for "any fair and just reason."

In 1983 rule 32(d) was amended to clarify the applicable post-sentence plea withdrawal standard and to clarify the post-sentence alternatives to a motion to withdraw. Fed.R.Crim.P. 32(d), advisory committee notes, 97 F.R.D. 245, 309 (1983).[4] Notwithstanding that a petitioner is to be given a more liberal consideration in seeking leave to withdraw

a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing. United States v. Rawlins, 440 F.2d 1043, 1045-46 (8th Cir. 1971). It is still within the trial court's discretion to allow or deny the same. Id. at 1046; United States v. Moore, 822 F.2d 35, 37 (8th Cir. 1987).

Several factors are to be considered in determining whether to allow a pre-sentence motion to withdraw a plea: (1) whether defendant established a fair and just reason to withdraw his plea; (2) whether defendant asserts his legal innocence of the charge; (3) the length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the

government will be prejudiced.[5] United States v. Dixon, 784 F.2d 855, 856-57 (8th Cir. 1986); United States v. Bryant, 640 F.2d 170, 172 (8th Cir. 1981); United States v. Barker, 514 F.2d 208, 220-22 (D.C. Cir.), cert. denied, 421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed.2d 682 (1975).

Boone did not assert his legal innocence and he waited two months before seeking to withdraw his guilty plea. The district court held that Boone failed to establish a fair and just reason to withdraw his plea. Therefore, the question of government prejudice was not reached.

The court found that Boone failed to establish that his plea was involuntary and failed to show ineffective representation of counsel.[6] The court found it unlikely that counsel told Boone

he would "certainly" receive a life sentence if he rejected the plea agreement. Counsel testified that he informed Boone that a guilty plea would reduce his exposure from a life sentence to twenty years, and that if he pled guilty he could not appeal the suppression denial. The district court diligently inquired about the validity of Boone's claims, considered the two months lapse before his motion to withdraw, and carefully reviewed the record of the plea hearing. The record of Boone's plea hearing directly contradicts Boone's assertions of involuntariness. In addition, the court found that defendant's testimony at the change of plea hearing that he knew and understood the terms of the agreement and its consequences established that his plea was voluntarily and intelligently made with adequate assistance of counsel.

We fail to find that the trial court abused its discretion in finding no fair and just reason for withdrawal of Boone's plea. In view of our holding that the guilty plea stands, we need not review defendant's claim relating to the alleged illegal search.[7]

David Brook Lanham

Lanham claims his constitutional rights to due process and to be free from cruel and unusual punishment were violated when the trial court imposed the maximum sentence. Lanham claims his role was no greater than co-defendants who received lesser sentences. He also alleges the court imposed the disparate sentence without any basis in fact.

Lanham claims that although the court ruled it would not consider controverted matters under rule 32(c)(3)(D)(ii), it

actually imposed a sentence for his "managerial" role in the operation by relying on challenged portions of the pre-sentence investigation report, which Lanham had no opportunity to rebut. He claims that absent characterization of Lanham as an administrator, there is no basis for the harsh sentence that was imposed. Therefore, the court violated the procedural requirements under rule 32 and Lanham should be resentenced.

A sentence within statutory limits is generally not subject to review. United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972); Castaldi v. United States, 783 F.2d 119, 123 (8th Cir.), cert. denied, 476 U.S. 1172, 106 S.Ct. 2897, 90 L.Ed.2d 983 (1986). In absence of gross abuse of discretion this court may not substitute

its judgment for the discretion committed to the district court. United States v. Hollis, 718 F.2d 277, 279 (8th Cir. 1983), cert. denied, 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984). The district court is not required to explain on record its reasons for disparate sentences imposed in similar co-defendants within the statutory limitations.[8] United States v. Hall, 778 F.2d 1427, 1429 (9th Cir. 1985); see also United States v. Moore, 656 F.2d 378 (8th Cir. 1981), cert. denied, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 176 (1982). Lanham's claim fails to consider the difference in the length of time defendants had been present on the farm. Lanham had been involved in the operation for four months. The rest of the defendants who received lesser sentences had been at the farm from two

days to a couple of weeks. In addition there was a difference between defendants in their capacity to contribute to the operation. Lanham had three years of college study in agricultural economics including a course in biology or plant growth.[9]

The sentence given to Lanham was within the terms of the bargained for and accepted plea agreement. When he pled guilty, he knowingly exposed himself to a term of up to eight years.

The judgments of the district court are affirmed.

FOOTNOTES

1. On October 23, 1987, law enforcement officials discovered a large marijuana production operation on a farm near New York Mills, Minnesota. A search was conducted and seventeen people were later indicted on drug charges. John Robert Boone and David Brook Lanham were among those indicted.

2. The Honorable Edward J. Devitt, Senior United States District Judge for the District of Minnesota.

3. We note that neither plaintiff was sentenced under the Sentencing Reform Act of 1984, as amended, 18 U.S.C. §§ 3551-3581 (1982 ed., Supp. IV) and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV). Therefore, we have applied standards of review effective prior to the passage of the Sentencing Guidelines.

4. Post-sentence relief now must be sought under 28 U.S.C. § 2255. Under § 2255 a petitioner must demonstrate "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962).

5. The notes of the advisory committee reject the notion that pre-sentence withdrawal of the plea should always be allowed unless the prosecution has been

substantially prejudiced by reliance on it. 97 F.R.D. at 313. Federal Rule of Criminal Procedure 11 provides procedural safeguards to insure the accuracy of the plea. Plea agreements are now placed on the record, there is full inquiry into the voluntariness of the plea, the defendant is given detailed advice concerning his rights and the consequences of a plea, and there must be a determination that defendant understands these matters. Therefore, there is no reason to view pleas as "tentative." Id.

6. At the change of plea proceeding Boone expressed satisfaction with his counsel:

> THE COURT: You've known Mr. Smith a long time. He's from Kentucky, too?
> DEFENDANT BOONE: Yes, sir.
> THE COURT: Do you have confidence in him?
> DEFENDANT BOONE: Very much, sir.
> THE COURT: Do you have any complaints to make about his legal services to you?
> DEFENDANT BONE: No, sir.
> THE COURT: And you want to plead guilty?
> DEFENDANT BOONE: Yes, sir.

Change of Plea Hearing Transcript, February 17, 1988, at 14.

7. A defendant who pleads guilty waives all non-jurisdictional defenses. Hughes v. United States, 371 F.2d 694, 696 (8th Cir. 1967), citing United States v. Ptomey, 366 F.2d 759, 760 (3d Cir. 1966).

8. In this case, there existed diverse differences in the circumstances surrounding each of the defendants.

9. At sentencing Lanham informed the court that contrary to his earlier objection, he had in fact studied agricultural economics, and had one course regarding biology or the raising of plants. Sentencing Transcript, April 29, 1988, at 24.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

NO. 88-5186	*
	*
UNITED STATES OF AMERICA,	*
	*
Appellee,	*
	*
vs.	*
	*
JOHN ROBERT BOONE,	*
	*
Appellant.	*

Appeal From The U.S.
District Court For The
District Of Minnesota

This appeal from the U. S. District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed

in accordance with the opinion of this Court.

March 6, 1989

ATTEST: [signed]
Robert D. St. Vrain
Clerk, U.S. Court of
Appeals, Eighth Circuit

MANDATE ISSUED: 4/20/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 88-5186 MN	*
	*
UNITED STATES OF AMERICA,	*
	*
Appellee,	*
	*
vs.	*
	*
JOHN ROBERT BOONE,	*
	*
Appellant.	*

The suggestion for rehearing en banc of the appellant has been considered by the Court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

April 12, 1989

Order entered at the
Direction of the Court:
[signed]
Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit